National Roof Systems, Inc. *and* Local 70, United Union of Roofers, Waterproofers & Allied Workers, AFL–CIO. Cases 7–CA–29492 and 7–CA–29611

December 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On June 7, 1991, Administrative Law Judge Irwin Kaplan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed an answering brief.[1]

The National Labor Relations Board had delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, National Roof Systems, Inc., Homer, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and reletter the remaining paragraphs accordingly.

''(c) Make whole all employees in the bargaining unit for any losses they may have suffered by reason of the Respondent's refusal to execute and abide by the collective bargaining agreement in effect between the Respondent and the Union, in the manner set forth in the remedy section of the judge's decision.''

2. Substitute the attached notice for that of the administrative law judge.

[1] The Charging Party's request for attorney's fees is denied on the ground that the defenses raised by the Respondent are ''debatable'' rather than ''frivolous.'' See *Heck's*, 215 NLRB 765 (1974); cf. *C. F. Eckert, Inc*., 301 NLRB 868 (1991).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent additionally asserts that the judge's findings of fact and conclusions of law reflect bias. After a careful review of the entire record, we are satisfied that this allegation is without merit.

[3] We shall modify the judge's recommended Order to include a general make-whole provision in accordance with the terms of the remedy section of his decision.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 70, United Union of Roofers, Waterproofers & Allied Workers, AFL–CIO (the Union), by refusing to recognize the Union as the exclusive bargaining representative for the following appropriate unit:

> All full-time and regular part-time skilled roofers, damp and waterproofers employed by National Roof Systems, Inc., working at or out of its facility located at 28290 M-60 East, Homer, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with the Union, by failing to execute and abide by the terms and conditions of our collective-bargaining agreement with the Union.

WE WILL NOT threaten to terminate or terminate or otherwise discriminate against our employees for refusing to sign an antiunion petition or for otherwise refusing to withdraw support for the Union.

WE WILL NOT coercively interrogate our employees about their union sentiments.

WE WILL NOT prepare or circulate an antiunion petition seeking the revocation of the Union's representative status.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed them by Section 7 of the Act.

WE WILL sign and abide by the terms and conditions of the collective-bargaining agreement found to be in effect between our Company and the Union.

WE WILL make whole all employees in the bargaining unit for any losses they may have suffered by reason of our refusal to execute and abide by our collective-bargaining agreement with the Union, with interest.

WE WILL make whole all employees in the bargaining unit set forth above and the Union for any losses they may have suffered by our failure to make the appropriate contributions to the funds established under the above-noted collective-bargaining agreement, with interest.

WE WILL offer Michael Silveus full and immediate reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earn-

ings suffered as a result of our discrimination against him, with interest.

NATIONAL ROOF SYSTEMS, INC.

Ellen Rosenthal, Esq., for the General Counsel.
George T. Brannick, Esq., of Jackson, Michigan, for the Respondent.
Neil J. Hirshberg, Esq., of Farmington Hills, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge. This case was heard on January 22 and 23, 1990, in Ann Arbor, Michigan. The underlying charges in Case 7–CA–29492 were filed by Local 70, United Union of Roofers, Waterproofers & Allied Workers, AFL–CIO (the Charging Party, Local 70, or the Union), on July 21, 1989. The underlying charges in Case 7–CA–29611 were filed by the Charging Party on August 24, 1989, and amended on September 29, 1989. The charges and amended charges gave rise to an order consolidating cases, complaint and notice of hearing dated September 29, 1989, alleging that National Roof Systems, Inc. (also Respondent or National Roof) engaged in certain acts and conduct in violation of Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act).

More particularly, it is alleged that Respondent violated Section 8(a)(5) of the Act, by refusing, since May 31, 1989, to execute a collective-bargaining agreement embodying terms and conditions agreed to with the Union on May 24, 1989, and that since on or about June 5, 1989, the Respondent further violated that section of the Act by failing and refusing to recognize the Union as the exclusive bargaining agent for its unit employees.

It is alleged that since on or about June 5, 1989, the Respondent violated Section 8(a)(3) of the Act, by terminating its employee, Michael Silveus, because he refused to sign a petition seeking the revocation of Union's representative status.

It is alleged that the Respondent independently violated Section 8(a)(1) of the Act, by, inter alia, interrogating its employees regarding their sympathies and desires for continued representation by the Union; circulating among its employees a petition seeking the revocation of the Union's representative status; and threatening employees with loss of employment if they failed or refused to sign the aforesaid antiunion petition.

The Respondent filed an answer, admitting, inter alia, certain jurisdictional facts, the supervisory and agency status of certain individuals, the Union's status as a labor organization, certain facts regarding its collective-bargaining history, and that since on or about June 5, 1989, it has failed and refused to recognize the Union as the exclusive bargaining representative for the unit employees. It denied that it reached an agreement with the Union on the terms and conditions of the alleged collective-bargaining agreement and denied that it violated the Act in any manner.

Based on the entire record, including my observations of the demeanor of the witnesses as they testified, and after careful consideration of the posttrial briefs, I make these

FINDINGS OF FACT

I. JURISDICTION

The Respondent, National Roof Systems, Inc., a Michigan corporation, is engaged in the installation and repair of roofs, primarily in the construction industry. It has maintained its principal office and place of business at 28290 M-60 East, in the Township of Albion,[1] in the State of Michigan. In connection with the aforenoted business operations, the Respondent, during the calendar year 1988, a representative time period, purchased and caused to be transported and delivered at its principal office and at various construction sites within the State of Michigan, roofing materials and other goods and materials valued in excess of $50,000 within the State of Michigan, directly from points outside the State of Michigan. It is alleged, Respondent admits, the record supports, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background and Sequence of Events*[2]

The Respondent, National Roof, has had a collective-bargaining relationship with either the Charging Party (Local 70 of Ann Arbor, Michigan) and/or its sister Locals and International Union since around 1986. (Volume, Vol I, Transcript, Tr. 12) At around that time, the Respondent had become a signatory to a contract with Local 166 in the Lansing, Michigan area. In 1988, Local 166 merged into Local 70, which Local continued to represent the Respondent's employees in the Lansing area. (Vol. I, Tr. 21.) The Respondent and Local 70 were also parties to a 2-year contact covering Ann Arbor and the Lansing areas which contract expired on May 31 or June 1, 1989. (Vol. I, Tr. 20; Vol. II, Tr. 143–144.) On still another contract, the Respondent was a party with Local 225 of Battle Creek-Kalamazoo, Michigan, covering Kalamazoo and four other adjoining counties. That contract by its terms was effective June 1, 1987 to June 1, 1989. (G.C. Exh. 5, p. 12.) Local 225 merged into Local 70, effective May 1, 1989. (Vol. I, Tr. 27; G.C. Exh. 1(a), Exh. 2.)

By letter dated May 12, 1989,[3] Local 70 Business Manager William Barber, notified the several companies under contract with Local 225 in the Battle Creek-Kalamazoo area, including Respondent, of the merger and that only he, Barber, ''is authorized to set up meetings for contract negotiations or sign a contract agreement.'' (G.C. Exh. 6.) In a telephone conversation in early May, between Barber and Dar-

[1] It is alleged that the principal office is located in the city of Homer. In the answer Respondent asserted that the location is actually in the Township of Albion and not in the city of Homer. It is noted that the Respondent's letterhead on an exhibit attached to the initial charges in Case 7–CA–29492 reflects the city of ''Homer'' as the location. (G.C. Exh. 1(a), attachment Exh. 1.) This minor conflict was not resolved at the hearing. In all other respects, the commerce facts, as alleged, are admitted. As jurisdiction is not in issue, this minor conflict may be resolved at the postdecision or compliance stage.

[2] Unless otherwise noted, the facts as set forth in this section are either undisputed or credited.

[3] All dates hereinafter refer to 1989, unless otherwise indicated.

rell Backinger, Respondent's vice president, they both indicated a willingness to negotiate jointly with companies under contract with Local 225. In addition to Respondent, the other two contractors under contract with Local 225 in the area were Smith-Graham Roofing and Sheriff Goslin Company (Vol. I, Tr. 32–33). A few days later Backinger telephoned Barber and informed him that Terry Cleland owner and president of Smith-Graham was willing to negotiate a new agreement jointly. The other contractor, Sheriff Goslin Company, refused to negotiate. (Vol. I, Tr. 33.) Barber, Backinger, and Cleland agreed to conduct their first bargaining session on May 19, at Cleland's place of business in Battle Creek.

At the May 19 session, Barber was assisted by Tom Curry, president and business agent of Local 70, and employees and former members of Local 225, George Chapman, Tom O'Sullivan, and Kent Miles.[4] For the contractors, Backinger and Cleland represented their respective companies. After introductions, Backinger and Cleland initiated a general discussion over their concerns about competing with the great majority of nonunion contractors in the Kalamazoo area.[5] Barber told the contractors that he understood the problems and that the Union planned to step up their organizing activities in the area. (Vol. I, Tr. 35, 108–110.)

The union representatives handed Cleland a copy of the Local 70 Lansing area collective-bargaining agreement to use as a frame of reference, particularly with regard to the language for the new contract. (Vol. I, Tr. 35–36; Vol. II, Tr. 135.) Backinger already had copies and was familiar with the wording and the terms and conditions in that contract. The contractors merely agreed to look at the contract but did not at that time agree to use the document as a basis for negotiations. (Vol. I, Tr. 109.) Barber and Curry expressed a desire to standardize benefits for all roofers within the jurisdiction of Local 70 (Ann Arbor, Lansing, and Kalamazoo areas). To accomplish this, the union officials indicated that they needed about a $2 increase toward health and welfare and another $2.10 would be deducted from employees' checks for such benefits as pension, apprenticeship, and vacation pay. (Vol. I, Tr. 37–38.) Basically, the Union was looking for $2 the first year to standardize benefits and for a long-term or 3-year contact. The contractors, on the other hand, were looking for $2 in wage concessions to be competitive and a short-term contract. (Vol. I, Tr. 39, 109.)

Still other subjects explored or discussed at the May 19 meeting included travel pay, foreman's pay, seniority, overtime, and the importance of maintaining an apprenticeship program.[6] (Vol. I, Tr. 36.) At the close of the meeting the union officials asked the contractors to review the Lansing contract before the next session as a basis for further negotiations and they agreed. (Vol. I, Tr. 40, 110–111, Vol. II, Tr. 99–100.) The meeting lasted about 2 hours. The parties made arrangements to meet at the same place again on May 24.

Sometime between May 19 and 24 Cleland met with Backinger over lunch to discuss the Union's proposals. Backinger acknowledged but Cleland denied that they also looked at the Local 70 contract at that time. (Compare, Vol. II, Tr. 123 with Tr. 145.) As scheduled, the parties met again on May 24. This time, none of the former employee-members of Local 225 attended. Thus, Barber and Curry represented the Union and Backinger and Cleland appeared for their respective companies. Early on, the parties agreed to use the wording as contained in the Lansing area contract. Cleland highlighted special concerns which he wanted discussed and clarified. One such subject involved the foreman's pay. Under the Local 70 contract, a second employee on the job would require foreman's wages; whereas, under the old Local 225 agreement, three or more employees had to be on the job for anyone to qualify for the foreman's wages. The Union agreed to satisfy Cleland's proposal for foreman's pay to apply when there are three men on the job.[7] (Vol. I, Tr. 45, 111–112; Vol. II, Tr. 124.)

Another of Cleland's concerns, as well as that of Backinger, was over travel pay. Cleland proposed extending the travel free zone from 20 miles to 25 miles to enable him to bid more competively in the Kalamazoo area. The union officials agreed to satisfy Cleland and Backinger on travel pay. (Vol. I, Tr. 45–46, 112, 117–118; Vol. II, Tr. 123–124.) Further, as an inducement for Cleland and Backinger to agree on a contract package, the Union noted that Local 70's contract, unlike that of Local 225, does not contain a seniority provision and it was willing to eliminate seniority from the new agreement. As testified by Barber: ''We thought it would help [Backinger and Cleland compete by not having the seniority clause and the men would be more production oriented.'' (Vol. I, Tr. 46–47.)

On the subject of wages, the parties finally reached an agreement on $2 an hour the first year and an additional 80 cents for each of the next 2 years, as proposed by the Union, and only after the Union made other concessions including a wage reopener. (Vol. I, Tr. 48–51, 115–118.) For Cleland, a major obstacle to the Union's wage proposal was the fact that he had already executed a number of construction contracts under a bid which was based on the old labor contract wage rates. (Vol. I, Tr. 51; Vol. II, Tr. 95–96.) To satisfy Cleland, the union officials asked Cleland to submit a list of such contracts to them and they would explain to the employees why, for those jobs, they had to be paid under the old contract thereby obviating the need to penalize the em-

[4] *Chapman* had been president of Local 225 and it appears that he along with O'Sullivan and Miles composed part of the Local 225 bargaining committee. Barber testified that he had not invited the aforenoted individuals to participate and did not know in advance that they would attend the meeting. The contractors introduced these former Local 225 members to Barber and Curry. Local 70 did not have an employee bargaining committee at that time. (Vol. I, Tr. 34–35, 39, 72–73.)

[5] In a letter to the parent union dated April 3, Backinger noted some of the more serious problems of competing with nonunion contractors which were predominant in the Kalamazoo area. There, Backinger listed, inter alia, the loss of union-represented shops and the failure of the Union to take steps in protecting union contractors, noting that there was ''no picketing on any project under construction.'' Backinger cautioned, that unless the Union provided assistance, ''this whole side of the state will be lost [to nonunion shops].'' (G.C. Exh. 1(a), attachment Exh. 1.)

[6] It is not clear whether all these items were merely mentioned or discussed at the first meeting. In any event each item was clearly discussed before the close of the second and last session on May 24.

[7] The agreed-upon contractual provision reads as follows:

> The Employer agrees that whenever three (3) [or] more men are used in the application of roofing on a job covered by this Agreement, a journeyman roofer shall be designated as a working foreman and shall be paid the foreman's rate of pay. [G.C. Exh. 1(a), attachment Exh. 6, art. XIII, p. 18.]

ployer for the wage increase. (Vol. I, Tr. 51.) Near the end of the meeting, the parties reviewed all the terms and conditions to ensure they were in agreement.

According to Barber and Curry, at the end of this meeting, which lasted from 2 to 2-1/2 hours, the parties had reached a full agreement on a new 3-year contract subject to ratification. (Vol. I, Tr. 50–56, 119.) Further, they testified that they told Backinger and Cleland that they would have the agreement typed and taken for a ratification vote at the union meeting scheduled for the last Tuesday in the month (May 30) and then make arrangements with them to have the contract executed. Backinger and Cleland denied that the parties had reached agreement on a full contract at that meeting. Backinger also denied that the Union indicated that it planned to take the agreement to the membership for a ratification vote. (Vol. II, Tr. 132–133.) Cleland testified that he did not remember anything said about a vote but ''at some point in time, either on May 19th or May 24th, [ratification] was brought out that it would have to be brought back out to the entire union body.'' (Vol. II, Tr. 97–98.)

On or about May 29, Barber received a telephone call from Attorney George Brannick who informed Barber that he represented National Roof and that he wanted to set up a schedule for negotiations. Barber told Attorney Brannick that the Union had already negotiated an agreement with Cleland and Backinger and pointed out that a ratification meeting was scheduled the following evening. Brannick told Barber that he would have to discuss the matter with Backinger and get back to him. (Vol. I, Tr. 59.) Barber then telephoned Backinger and asked why he had his attorney contact him about negotiations when they already had negotiated an agreement which was about to be taken to the membership for ratification. Backinger told Barber that his employees were not satisfied and were going to vote to decertify the Union. (Id. at 60.)

The membership ratified that agreement on May 30. (G.C. Exh. 1(a), attachment Exh. 5; Vol. Tr. 61.) On or about June 1, Backinger assembled his employees and discussed matters pertaining to the recently concluded contract negotiations and the employees' desires to have the Union continue to represent them. In addition to Darrell Backinger, there were two brothers, Ron and Doug Backinger, and Foreman Charlie Bowers at the meeting. The employees attending were Michael Silveus, Brian Drake, Alan Luke, Donnie Luke, and Luther Luke.

As testified by former employee Michael Silveus, Darrell Backinger told the employees at this meeting that he was interested in knowing whether they wanted to remain with the Union. Silveus told Backinger he was not then able to make such a quick decision. At some point the three Lukes and Drake left the office to discuss among themselves whether they wanted the Union. Silveus, with corroboration from former employee Brian Drake, testified that Drake told Backinger that he wanted to stay in the Union.[8] (Vol. II, Tr. 7–8, 68.) Backinger spoke of the negotiations recently completed and complained that the wages and other benefits were too expensive and that they could do as well or better without the Union. Silveus testified, without contradiction, that he overheard Backinger tell his brothers that he thought he could get out of the of the contract and placed a phone call to Cleland in Silveus' presence. (Vol. II. Tr. 9–10.)

By letter dated June 1, Respondent's attorney, Brannick, advised Neil Hirshberg, the union attorney, ''that a serious question arises concerning representation by Local 70'' vis-a-vis the Respondent's employees and that of Cleland's company. (G.C. Exh. 1(a), attachment Exh. 7.) There, Brannick also indicated that Respondent needed documentation that Local 70 is the successor to Local 225 before Respondent would bargain and negotiate with the Union. (Ibid.)

The following day, June 2, shortly after lunch, Backinger appeared at the National Guard Unit jobsite to hand out paychecks to Silveus and other employees working at that location. After distributing the paychecks, Backinger approached Silveus and handed him a union disaffection petition which Backinger asked him to sign. Silveus testified that Backinger cautioned him that if he failed to sign, he could no longer work for him (Backinger). At the time no other name appeared on the petition. Silveus told Backinger that he would not make a snap decision and wanted to think about it over the weekend. (Vol. II, Tr. 13–14.) Backinger admitted the substance of Silveus' testimony except for the threat to discharge the latter. According to Backinger, when Silveus asked for more time to think about adding his signature to the petition, the former merely said fine and nothing else. (Vol. II, Tr. 141.) Backinger's testimony in this regard was corroborated by employee Luther Luke, who was nearby when Backinger asked Silveus to sign the petition. Backinger also acknowledged that the petition was typed by an office clerical under his direction. (Ibid.)

The next working day, Monday, June 5, Silveus drove one of the company van's to the Pack-A-Plaza parking lot where the carpool usually met on the way to the jobsite. Silveus did not wear his typical work clothes because he was not going to sign the petition and did not expect Backinger to permit him to work. He asserted that he would have worked in the outfit he was wearing as he had done in the past if Backinger indicated otherwise. Backinger met Silveus at Park-A-Plaza with the antiunion petition in his hand and asked the latter if he was going to sign and Silveus responded in the negative. Within minutes, Backinger asked Silveus if he would drive the van back to Respondent's facility. Silveus told Backinger that he would do so but needed a ride back to his house. Darrell Backinger was already at the shop at the time Silveus arrived with the van. Silveus and Backinger spoke

[8] Both Silveus and Drake testified on behalf of the General Counsel. Their testimony was, at times, confusing and disjointed regarding what transpired at the meeting. I believe the confusion comes largely from difficulties in articulating generally and, more particularly, in expressing themselves about an event which occurred nearly 8 months earlier, rather than reflective of a lack of candor on their part. Luther Luke was a witness for the Respondent but was not questioned about the substance of the meeting. Similarly, Darrell Backinger did not testify about this meeting as part of the Respondent's case. However, when questioned by me and by counsel for the General Counsel about the meeting, Backinger corroborated a number of the statements ascribed to him by Silveus and Drake. Under all the circumstances, including factors noted, infra, reflecting adversely on Backinger's credibility and on the basis of demeanor considerations, I credit Silveus and Drake over Backinger. Backinger admitted telling the employees of the Union's proposals as well his reservations therewith. He also admitted, inter alia, asking the employees whether they wanted him to continue to negotiate—''was it worth it for me to keep talkimg to [the Union] or should I just tell them to shove it.'' (Vol. II, Tr. 148–49.)

briefly while the former was waiting for his ride home. Backinger asked Silveus what he would be doing and the latter indicated that he would be working on a new construction job. (According to Silveus, after his exchange with Backinger on Friday over the signing of the petition, the former contacted Tom Curry, union president, because he wanted another job lined up if he refused to sign the petition.) Darrell Backinger's brother Ron drove Silveus home. (As noted previously, it is alleged that Respondent terminated Silveus in violation of Section 8(a)(3).)

In early June, Barber and Curry visited Backinger at Respondent's facility with the typed formal contract ready for execution. Backinger told the union officials that while he did not have any problems with the contract, he had to consider the desires of his employees and they wanted to go nonunion. Barber told Backinger to review the contract and that he would get together with Backinger later for his signature. Backinger told Barber that the Union also faced a problem with Cleland over the contract. Barber informed Backinger that he and Curry were on their way to visit Cleland.

Cleland's principal concern was over project bids under the expired contract wage rate. While the new contract did not provide the protection Cleland wanted, Barber and Curry reiterated the assurances given to Cleland on May 24, to wit, that he would not be required to pay the new wage rates for jobs previously bid. The union officials left the contract with Cleland to proofread, review, and confirm that the provisions comported with the agreements reached during negotiations. Approximately 1 week later, Cleland signed the contract. (Vol. I, Tr. 64; G.C. Exh. 1(a), attachment Exh. 6.) Cleland acknowledged that the contract he signed was consistent with everything agreed to during negotiations except for a typographical error involving travel pay which was corrected. (Vol. II, Tr. 109.) Backinger denied that he reached any agreement with the Union and has refused to sign the same contract.

B. *Discussion and Conclusions*

1. Whether the Respondent agreed to the terms and conditions of a collective-bargaining agreement

It is alleged that the Respondent reached a full agreement with Local 70 on a new 3-year contract on May 24, subject only to ratification which occurred on May 30. The record disclosed that Backinger, on behalf of Respondent, and that Cleland, on behalf of his company, bargained jointly with Local 70, as the successor to Local 225 for a new collective-bargaining agreement. The parties met on May 19 and again on May 24 at which later date, according to union negotiators Barber and Curry, the parties had reached a full agreement. Cleland and Backinger denied that the parties had come to a full agreement on May 24, although Cleland acknowledged that the contract he executed was entirely consistent with all the terms and conditions agreed to on May 24, except for a typographical error involving travel pay which was corrected. Backinger has refused to execute the agreement. Whether Backinger was so justified turns almost entirely on the credibility of Barber and Curry versus that of Cleland and Backinger.

In crediting Barber and Curry over Respondent's witnesses, I rely on demeanor factors as well as noting that their testimony, in the main, was mutually corroborative, and internally consistent with the record as a whole. Thus, the union officials testified that they explained to Cleland and Backinger, the steps to be taken to submit the agreement reached on May 24 to the contractors in a form ready for them to execute. In this regard, they told Cleland and Backinger that the agreement had to be taken to the membership to vote on ratification and then to be typed and presented to them (the contractors) for their signatures. (G.C. Exh. 1(a), attachment Exh. 4; Vol. I, Tr. 55–56, 122.) The record disclosed that the membership ratified the agreement on May 31. (G.C. Exh. 1(a), attachment Exh. 5.)

I reject Backinger's denial that he had any idea on May 24 that the Union indicated that it would present the proposals which were negotiated to its membership for a ratification vote. (Vol. II. Tr. 133–134.) In this connection, it is noted that even Cleland acknowledged, when asked about ratification, that the Union would have to go back to the ''entire union body.'' (Vol. II, Tr. 97–98.) While Cleland gave conflicting accounts, he also testified that ''the entire union body would have to *vote* [emphasis added] on whatever was talked about.''[9] (Vol. II, Tr. 97.) Given, the conflicting testimony of one Respondent's witness (Cleland), and the total ignorance on this subject from Respondent's other chief witness (Backinger), I find that their testimony is not only inconsistent with each other but, as such, it also tends to cast doubt regarding the overall credibility of these witnesses.

In discounting Backinger's testimony, it is noted that on direct examination, he was questioned only in broadest terms, on whether he had come to any agreement affecting wages, hours, and other terms and conditions of employment. To this, Backinger responded, ''No.'' (Vol. II, Tr. 127.) Thus, Backinger was not asked as part of Respondent's case, specifically, whether the parties had come to any agreement on wages, seniority, foreman's pay, travel pay, and other items which even Cleland admitted had been agreed to at the last session on May 24. In this connection, Cleland had acknowledged to the NLRB Regional Office during the course of the investigation of the charges in Case 7–CA–29492, that the Union's wage proposals at that second meeting was acceptable because of the number of concessions made by the Union on other items. (G.C. Exh. 7.) Significantly, Backinger did not specifically deny that agreement had been reached on any of these items. Rather, he only denied a question posed in boiler plate language dictating a legal conclusion as to whether the parties had reached a full agreement on a contract.

Backinger asserted belatedly, after completing his testimony on direct examination, without corroboration from Cleland, that issues still open after the May 24 meeting involved floating overtime, qualification for insurance, and the problems of competing with nonunion companies. (Vol. II, Tr. 132–133.) Clearly, the last of these items is not a mandatory subject of bargaining. As for the issues of overtime and insurance, the credited testimony disclosed that these matters had been discussed and were no longer issues by the time the parties reached a full agreement on a new contact at the

[9] Still later, Cleland testified, ''I don't remember [the union officials] saying anything about taking a vote on it.'' (Vol. II, Tr. 98.) Also militating against the reliability of Cleland's overall testimony were some recent unspecified personal problems which made ''dates and a lot of things'' difficult for him to remember. (Vol. II, Tr. 115.)

end of the session on May 24. Curry credibly testified, without contradiction, that to satisfy Backinger, the union offered to have his employees to come in at a lower requalification rate for insurance coverage ''so that it wouldn't [be] a burden on his [Backinger's] employees.'' (Vol I, Tr. 138–139.) On the issue of overtime, the union officials explained the need to standardize certain terms including overtime and rejected Respondent's proposal not to pay overtime after 8 hours of work in any given day. The matter was dropped thereby leaving the contractual language on this subject unchanged. (Vol. I, Tr. 58, 120.)

The credited testimony disclosed that Cleland and Backinger bargained jointly with the Union for essentially the same contract. Further, at the close of the May 24 session, the parties summarized all the terms and conditions of the new full collective-bargaining agreement which were reached at that meeting subject only to ratification. At noted previously, this was the same agreement signed by Cleland and subsequently repudiated by Backinger. The old Local 225 agreement terminated on June 1, 1989, at 12:01 a.m. (G.C. Exh. 5, p. 12.) The new contract, with Local 70 (the successor to Local 225), by its terms is effective from June 1, 1989, through May 31, 1992. (See G.C. Exh. 1(a), attachment Exh. 6.) That agreement was ratified on May 30, 1989, before the old agreement terminated. Thus, there was no time gap in which Backinger was at liberty to lawfully repudiate either the old or new agreements, even if the new contract had not yet been typed and formally presented to him for his signature. See generally *Cedar Valley Corp*., 302 NLRB 802 (1991).

The record disclosed that Respondent is an employer engaged in the construction industry and, as such, its collective-bargaining contracts are 8(f) agreements. It is undisputed that in early June 1989, Barber and Curry presented Backinger the new 8(f) agreement to execute. This Backinger refused to do and, in effect, repudiated the agreement.[10] In *Cedar Valley Corp*., supra, the Board recently reaffirmed the principle that a party may not lawfully repudiate an 8(f) agreement during its term, citing, *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 109 S.Ct. 222 (1988). It is also well settled that a party is obligated, on request, to sign a written contract embodying the terms and conditions of the full and complete oral agreement. *Heinz v. NLRB*, 311 U.S. 514 (1941). In view of the foregoing and in the total circumstances of this case, I find the Respondent's refusal to execute the agreement it was presented in early June violated Section 8(a)(5) and (1) as alleged.

2. Whether the Respondent unlawfully withdrew recognition from Local 70

The record disclosed that after Backinger learned that Local 70 was the successor to Local 225, he met and negotiated a full contract package with officials of the successor organization, Local 70. By letter dated June 1, 1989, after the new contract had been ratified, the Respondent, by its attorney, raised the issue of Local 70's status as a successor organization for the first time. It appears that after Backinger agreed to the contract package, he changed his mind and engaged in a course of conduct (discussed more fully, infra) to rid himself of any collective-bargaining responsibilities. Neither at the hearing nor in its brief does the Respondent question the standing of Local 70 as a successor. Thus, it appears that Respondent has abandoned successorship as an issue.

In any event, the complaint alleged and Respondent's answer admitted that since on or about June 5, 1989, the Respondent has failed and refused to recognize Local 70 as the exclusive collective-bargaining representative of the appropriate unit.[11] As the Respondent was already obligated to adhere to the terms and conditions of the new contract (for reasons discussed in sec. 1, supra), it is thereby precluded from repudiating a collective-bargaining agreement during its term or challenging the Union's representative status during the term of that agreement without going through the Board's election processes.[12] See *John Deklewa & Sons*, supra at 1383 fn. 31, 1385. In short, Respondent's failure and refusal to recognize the Union is violative of Section 8(a)(5) and (1) as alleged.

3. Whether Respondent coercively interrogated its employees

It is undisputed that on or about May 31, 1989, Backinger conducted a meeting of his employees at his facility where, inter alia, he informed them of the contract negotiations and of the various reservations he had with the contract package. He also solicited employee input as to which direction he, Backinger, should take regarding future negotiations. As testified by Backinger, he asked his employees to leave the meeting to consult among themselves and to let him know whether to continue to negotiate ''or should I just tell [the Union] to shove it.'' (Vol. II, Tr. 148–149.) Backinger also testified that he told the employees that they could go non-

[10] The credited testimony disclosed that Cleland and Backinger were told by Barber that the complete agreed-upon contract package would be submitted to the union membership to vote on ratification. Respondent does not contend, nor do I find, that it effectively repudiated its agreement before the contract was ratified. Cf. *Loggins Meat Co*., 206 NLRB 303, 307–309 (1973); see also *Tri-Products Co*., 300 NLRB 974 (1990).

[11] The General Counsel's brief points out that the alleged unit ''mirrors that delineated in the Local 225 contract and the language agreed upon by the parties and is presumptively appropriate.'' Respondent, in its answer, neither denies nor admits the the allegation on the basis that Ronald Backinger and Douglas Backinger (admitted supervisors) were unit members. As Respondent did not address this allegation at the hearing or in its brief, it does not appear that the unit allegation is contested. The record is devoid of any evidence tending to show that supervisors are involved in the control or administration of union business. In the absence of any demonstrated conflict of interest, and none has been shown to exist herein, mere membership in the unit by supervisors is not sufficient to invalidate an otherwise appropriate unit. *Highland Hospital*, 288 NLRB 750 (1988). Given also Darrell Backinger's active participation in the negotiations leading to a full collective-bargaining agreement covering his employees with the traditional exclusions, I find the unit appropriate as alleged. See, e.g., *Joseph Stern & Sons*, 297 NLRB 1 fn. 2 (1989).

[12] While the complaint alleged a 9(a) bargaining relationship, this is not supported by the record, as acknowledged by counsel for the General Counsel in her brief. It is contended, and I have previously observed, the Respondent is a construction industry employer and and its bargaining obligations are by virtue of Sec. 8(f).

union but he denied asking them their opinion on this subject. (Vol. II, Tr. 150.)

Silveus and Drake credibly testified that Backinger asked each of the employees whether they wanted Respondent to remain a union company. (For reasons stated previously, I reject Backinger's denials where in conflict with the testimony of Silveus and Drake.) While it appears that Backinger may have committed a number of independent unfair labor practices at this meeting, including direct dealing with employees and bypassing and undermining the Union's bargaining position, the complaint only alleged coercive interrogation regarding the employees' desires for continued membership in and representation by the Union. As such, my findings as to the occasion in question address only the allegation although, I have considered the other factors in assessing the total circumstances. See generally *Rossmore House*, 269 NLRB 1176 (1984), and its progeny.

The record is devoid of any evidence to justify Backinger's questioning or polling his employees regarding their union sentiments. Backinger had already obligated the Respondent to a new 3-year agreement at the time of the meeting so that, under *Deklewa* principles,[13] he could not then challenge, in the absence of a valid election petition, the Union's majority or 8(f) bargaining status. Moreover, assuming arguendo, Respondent faced an open period to contest the 8(f) bargaining relationship, Backinger clearly did not comport with longtime Board safeguards, as set forth in *Strucknes Construction Co*., 165 NLRB 1062, 1063 (1967), which required, absent unusual circumstances (none shown here), inter alia, polling by secret ballot and unambiguous assurances against reprisals. As noted by the Board, ''Secrecy of the ballot will give further assurance that reprisals cannot be taken against employees because the views of each individual will not be known.'' (Ibid; cf. *Boaz Carpet Yarns*, 280 NLRB 40 (1986).)

In assessing the foregoing and the total context of Backinger's comments at the meeting, I am persuaded and I find that his inquires of employees regarding their union sentiments amounted to unlawful interrogation as alleged.

4. The antiunion petition, the threat of discharge, and the alleged discharge

It is undisputed that on or about Friday, June 2, Darrell Backinger circulated among the employees a petition seeking the revocation of the Union's representative status. The petition had been typed by an office clerical under the direction and supervision of Backinger. (Vol. II, Tr. 140–41.) The record is devoid of any corroborative or credible testimony tending to show that Backinger's efforts or assistance regarding this petition had been requested by employees. Silveus credibly testified that Backinger told him that if he did not sign the petition, he could no longer work for Backinger. Silveus, in turn, told Backinger, that he needed more time to think about it and would let him know on Monday. Backinger admitted asking Silveus to sign and that the latter had requested additional time to ponder the request but denied that he threatened Silveus. Employee Luther Luke, overheard the verbal exchange and he testified that Backinger did not threaten Silveus. I have rejected Luke's testimony on this point.[14]

First, the record is abundantly clear that Backinger improperly and within the meaning of Section 8(a)(1) composed an antiunion petition which he circulated among his employees and exhorted them to sign. See *Erickson's Sentry of Bend*, 273 NLRB 63 (1984); cf. *Birmingham Ornamental Iron Co*., 240 NLRB 898, 901–902 (1979) (no showing that the supervisor urged any employee to sign the antiunion petition); *Morse Electro Products Corp*., 210 NLRB 1075, 1076 (1974) (no showing that Respondent ''sponsored, encouraged, or participated in the circulation of the Decertification Petition''). As I have credited Silveus' full account of this encounter, I find that Backinger threatened him with the loss of employment if he failed and refused to sign the petition, thereby additionally violating Section 8(a)(1), as alleged. I turn now to consider the alleged discharge of Silveus on June 5.

It is undisputed that Silveus asked Backinger for more time to consider whether to sign the petition. Silveus credibly testified, without contradiction, that he told Backinger that he wanted the weekend to think about signing and that he would let him know on Monday. On the morning of Monday, June 5, in a parking lot before the workday began, Backinger again solicited Silveus' signature. This time, Silveus told Backinger that he would not sign the document. Within minutes, Backinger asked Silveus to drive the Company van back to Respondent's shop rather than to the jobsite which confirmed for the latter that he was discharged. Shortly after Silveus dropped the van off, Backinger's brother drove Silveus home, as the latter requested because he was no longer working for the Company and was without transportation. Darrell Backinger denied that he discharged Silveus but did not testify to the events of June 5 nor did anyone else on behalf of Respondent.

According to Silveus, he may not have worn his usual work clothes on June 5 because he had decided that he would not sign the petition and understood from Darrell Backinger's threat on Friday, that if he failed to do so, he was terminated. However, Silveus also asserted that had Backinger permitted him to work, he would have done so and without regard to the clothes he had on at the time. In

[13] See *John Deklewa & Sons*, supra at 1385, where the Board instructed: ''Where parties enter into an 8(f) agreement, they will be required, by virtue of Section 8(a)(5) and Section 8(b)(3), to comply with that agreement *unless the employees vote, in a Board conducted election, to reject (decertify) or change their bargaining representative*.'' [Emphasis added, citation omitted.]

[14] On the basis of my observation of Luke's demeanor as well as the limited nature of his testimony (Luke was asked nothing about Backinger's remarks at the employee meeting dealing with the contract negotiations and the polling of employees), I find somewhat suspect Luke's certainty that he heard the entire conversation and recalled everything that was said approximately 8 months ago on the occasion in question. Additionally, it is noted that Luke was still employed by Respondent at the time he testified and admitted that he did not want to be represented by the Union which factors tend to militate against assessing his testimony as a disinterested witness. It is also noted that Luke was present in the hearing room when Backinger testified. These circumstances do not inspire confidence in the independence or reliability of Luke's testimony. Under all the circumstances, including demeanor factors, I give no weight and reject Luke's account which was almost identical to that provided by Backinger (a witness whose testimony in other critical areas has been rejected).

this connection, he testified without contradiction, that he had done so in the past. (Vol. II, Tr. 44.)

Backinger did nothing on the occasion in question, to disabuse Silveus from any possible misconception, regarding the import of his threat. The test is whether Backinger's statements and action reasonably led Silveus to believe that he was terminated. See *Pink Supply Corp*., 249 NLRB 674 (1980); *C. J. Krehbiel Co*., 227 NLRB 383, 384 (1976); Here, I find that Backinger's words and action clearly supported Silveus' perception of the consequences of his failure to sign. Thus, Backinger had Silveus drive the company van back to the office instead of to the jobsite where the latter was scheduled to work. Further, as testified credibly by Silveus, without contradiction, shortly after he returned the van to Respondent's facility, Backinger asked him ''what [he] was going to be doing.'' In context, those words only have meaning if it follows that Silveus' employment, was already treated by Backinger to be at an end. Silveus had been employed by Respondent for 6 years, and there is no record testimony suggesting that Backinger made any effort to induce Silveus to remain an employee for Respondent or to inquire why his longtime employee was leaving.

Respondent's antiunion animus is amply demonstrated on the record. As noted above, Backinger was deeply involved in preparing and circulating the antiunion petition and threatened to terminate Silveus for refusing to sign it.[15] Counsel for the General Counsel has also established the other elements necessary for a prima facie discriminatory discharge finding: Silveus' support for the Union, Respondent's knowledge thereof, and the timing of the discharge on the heels of Silveus' refusal to sign the antiunion petition. On the other hand, the Respondent has failed to show that Silveus would have been terminated for reasons other that his support for the Union. See *Wright Line*, 251 NLRB 1083, 1089 (1980). In short, I find that Respondent threatened to discharge Silveus in violation of Section 8(a)(1) and subsequently terminated him, in violation of Section 8(a)(3) and (1), as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time skilled roofers, damp and waterproofers employed by Respondent working at or out of its facility located at 28290 M-60 East, Homer, Michigan: but excluding office clerical employees guards and supervisors as defined in the Act.

4. By virtue of Respondent's collective-bargaining history and Section 8(f) of the Act, the Union is the limited exclusive collective-bargaining representative of Respondent's employees in the unit described above.

5. By refusing to execute a full and complete collective-bargaining agreement it reached with the Union on May 24, 1989, effective by its terms from June 1, 1989, through May 31, 1992, covering the unit described above, despite subsequent timely requests to do so by the Union, the Respondent has violated Section 8(a)(5) and (1) of the Act.

6. By failing and refusing since on or about June 5, 1989, to recognize the Union as the exclusive collective-bargaining representative for the unit described above, the Respondent has additionally violated Section 8(a)(5) and (1) of the Act.

7. By discharging its employee, Michael Silveus, because he refused to sign an antiunion petition, the Respondent violated Section 8(a)(3) and (1) of the Act.

8. By coercively interrogating its employees; circulating a petition seeking the revocation of the Union's representative status; and threatening its employees with the loss of employment for failing or refusing to sign the petition, the Respondent has violated Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of the Act, I shall recommend that it cease and desist therefrom, and to take certain appropriate action to effectuate the purposes and policies of the Act.

Having found that the Respondent has refused to execute and abide with the terms and conditions of the collective-bargaining contract with which it was obligated to fulfill, I shall recommend that it be ordered to make unit employees whole in the manner set forth in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), with interest prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondent shall pay any contractually agreed-on health and welfare, pension, or other trust funds which said Respondent was obligated to make to the Union on behalf of unit employees in accordance with the Board's decision in *Fox Painting Co*., 263 NLRB 437 (1982); see also *F. A. Ford Electrical Contracting*, 296 NLRB No. 84 (Sept. 20, 1989) (not reported in Board volumes). Any interest owed thereon should be determined and paid as set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).

Having found that the Respondent terminated Michael Silveus in violation of Section 8(a)(3), I shall recommend that the Respondent be ordered to offer him immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of earnings suffered as a result of the discrimination, with backpay computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.

[15] Backinger had expressed his concerns to the Union and to his employees about the amount of work going to nonunion companies in the western part of Michigan. Yet, incredibly, Backinger also asserted during his testimony that he did not believe that it would be easier for him to compete with nonunion companies if the Respondent was also nonunion. (Vol. II. Tr. 151–152.) Backinger's most active role in preparing and circulating the antiunion petition, inter alia, tend to belie such assertion.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, National Roof Systems, Inc., Homer, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 70, United Union of Roofers, Waterproofers & Allied Workers, AFL–CIO by refusing to recognize the union as the exclusive bargaining representative for the following appropriate unit:

> All full-time and regular part-time skilled roofers, damp and waterproofers employed by Respondent working at or out of its facility located at 28290 M-60 East, Homer, Michigan; but excluding office clerical employees guards and supervisors as defined in the Act.

(b) Refusing to bargain with the Union, by failing to execute and abide by the terms and conditions of the collective-bargaining agreement in effect between the Respondent and the Union.

(c) Threatening to terminate, terminating, or otherwise discriminating against employees for refusing to sign an antiunion petition or refusing to withdraw support for the Union.

(d) Coercively interrogating and polling employees to ascertain their union sentiments.

(e) Preparing and circulating an antiunion petition seeking the revocation of the Union's representative status.

(f) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit set forth above with regard to terms and conditions of employment.

(b) Sign and abide by the terms and conditions of the collective-bargaining agreement in effect between Respondent and the Union.

(c) Make whole all employees in the bargaining unit and the Union, for any losses they may have suffered by reason of Respondent's failure to make the appropriate contributions to the various funds established under the applicable collective-bargaining agreement, with interest, in the manner set forth above in the remedy section of this decision.

(d) Offer Michael Silveus full and immediate reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered as a result of the discrimination against him in the manner set forth above in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examining and copying, all payroll records, and reports, and all other records necessary to analyze the amount of backpay and other moneys due under the terms of this Order.

(f) Post at its facility in Homer, Michigan, copies of the attached notice marked ''Appendix.''[17] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''